PHILEOALLIED BANK (MALAYSIA) BHD

v.

KOSHISH CREDIT & LEASING SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT3-24-197-99]
30 AUGUST 2001

LAND LAW: *Charge - Order for sale - Whether vesting order complied with - Whether charge properly transferred and registered - Whether vesting order filed in land registry - Merger of banks - Chargee bank taken over by another bank - Banking and Financial Institutions Act 1989, s. 50(1), (3) - National Land Code, s. 420(1), (2), (3), (4)*

At the outset of the hearing of the foreclosure proceedings brought by the plaintiff bank on the basis of a registered charge over landed property, the defendant raised the preliminary objection that the plaintiff had failed to comply with the vesting order (together with all the consequential amendments) made in favour of the plaintiff. It was contended that the plaintiff could not proceed unless and until the registered charge had been registered in the name of Malayan Banking by way of filing the vesting order in the appropriate land registry.

Held:

[1] Following an exercise pertaining to the merger of banks, the plaintiff's business and assets (which for the purposes of this judgment would include the registered charge) was vested in Malayan Banking Bhd pursuant to the vesting order, as a result of which the plaintiff ceased to be the beneficial owner and Malayan Banking Bhd became the new owner thereof. (p 790 c)

[2] Section 50(3) of Banking and Financial Institutions Act 1989 ('BAFIA') expressly provides that such vesting order "shall have effect according to its terms notwithstanding anything in any law or in any rule of law". These words are clear and unambiguous and it is the duty of the court to give effect to them as they are reflective of the intention of Parliament. (p 791 h)

[3] When the National Land Code ('NLC') was enacted in 1965, BAFIA had not been brought into being yet. Therefore Parliament could not have intented s. 420 of the NLC to override the provisions of s. 50(1) and (3) of BAFIA which was never in existence then. (p 792 g)

[4] In any event, where there is an inconsistency between the provisions of two Acts of Parliament, as in s. 420 NLC and s. 50(1) and (3) of BAFIA, the latter which was enacted some 24 years later must prevail. (p 793 b)

[5] The vesting order in clear and unambiguous terms stated that the transfer was given effect to and granted by the court from 1 March 2001. That being the case, the property and business of the plaintiff had been vested in Malayan Banking with effect from 1 March 2001. (p 796 b)

[Preliminary objection dismissed with costs.]

Case(s) referred to:
Leong Moh Sawmill Co Sdn Bhd (in liquidation) v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 ***(refd)***
Ramayah Etican v. Hussin Dahlan [1993] MLJ 113 ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50(1), (3)
Legal Profession Act 1976, s. 123
National Land Code 1965, ss. 256, 420(1), (2), (3), (4)
Rules of the High Court 1980, O. 15 r. 7(2)
Subordinate Courts Act 1948, s. 69(g)

For the plaintiff - Chang Wei Mun (Lim Siew Ming); M/s Raja, Darryl & Loh
For the defendant - Thakurdas Naraindas Jethwani; M/s Thakurdas Jethwani & Co

Reported by Yow Ting Fong

JUDGMENT

Low Hop Bing J:

Preliminary Objection

At the outset of the hearing of foreclosure proceedings by way of an originating summons in encl. (1) commenced by the plaintiff on 11 February 1999 against the defendant on the basis of a registered charge over landed property pursuant to s. 256 of the National Land Code 1965 (NLC) ("registered charge"), En. Thakurdas Jethwani, learned counsel for the defendant, raised a preliminary objection on the ground that the plaintiff has failed to comply with the vesting order (together with all the consequential amendments) ("the vesting order") made in favour of the plaintiff in the Kuala Lumpur High Court No. D9-24-27-2001. The defendant seeks an order that the plaintiff's said originating summons be struck out or stayed until the plaintiff has fully complied with the vesting

order. In other words, it is said for the defendant that the plaintiff cannot proceed with the originating summons unless and until the registered charge has been registered in the name of Malayan Banking Bhd., which he added must be done by filing the vesting order with the appropriate land authority. For the purpose of this judgment, a reference to the vesting order shall include all the consequential amendments thereto.

Common Ground

It is common ground that pursuant to an exercise pertaining to the merger of banks, the plaintiff's business and assets (which for the purposes of this judgment would include the registered charge) had been vested in Malayan Banking Bhd. pursuant to the vesting order, as a result of which the plaintiff ceased to be the beneficial owner and Malayan Banking Bhd. became the new owner thereof.

Defendant's Contention

It is the defendant's contention that while complying with para (D) of the vesting order, the plaintiff however had ostensibly not complied with, *inter alia*, para (B)(xvi) and (xvii) thereof which required registration, with the relevant authority, "for the purpose of vesting in the TRANSFEREE" the registered charge.

It was further submitted for the defendant that s. 50(1) of the Banking and Financial Institutions Act 1989 (Act 372) ("BAFIA") provides for the vesting of any property or business and that s. 50(3) thereof requires the vesting to be done in accordance with the terms of the vesting order.

The argument for the defendant is that s. 50(1), *supra*, covers the vesting not only of landed property and the interests therein but also the transfer of any property or business, including furniture, cars, receivables, goodwill and the like, all of which are not landed properties and so do not require registration, as vesting would take place on the transfer date prescribed in the vesting order.

In respect of landed property, the view advanced for the defendant is that under s. 50(3) vesting could only take effect after it has been registered with the relevant authority, in accordance with para. (C) of the vesting order. Defendant also relied on s. 420 of NLC for supporting the contention that the vesting order covering landed properties must be registered with the relevant authority.

Plaintiff's Response

The short answer given by En. Chang Wei Mun and Cik Lim Siew Ming, both learned counsel for the plaintiff, is that under s. 50(3), *supra*, the

vesting order supersedes all written laws, even NLC and that the terms of the said vesting order allow the plaintiff's originating summons to continue without the necessity of substituting Malayan Banking Bhd. as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd. at the appropriate land registry. In the circumstances, they are of the view that the defendant's preliminary objection is without merits.

Decision Of The Court

By way of recapitulation, the preliminary objection raised for the defendant is that the plaintiff cannot proceed with this originating summons unless and until the registered charge has been registered in the name of Malayan Banking Bhd. by way of filing the vesting order in the appropriate land registry. The question is therefore whether there are merits in this preliminary objection.

The vesting order was made under s. 50(1) of BAFIA after the parties in the merger *viz*, the transferor and the transferee institutions *viz* Phileo Allied (M) Sdn Bhd and Malayan Banking Bhd. have made a joint application to the Kuala Lumpur High Court by way of an *ex parte* originating summons. Section 50(3) of BAFIA, which must be read in conjunction with s. 50(1), *supra*, is of critical importance to the determination of the preliminary objection and merits reproduction as follows:

> (3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

Section 50(3) of BAFIA expressly provides that the vesting order "shall have effect according to its terms notwithstanding anything in any law or in any rule of law". As these words are clear and unambiguous, it is the duty of the court to give effect to them as they are reflective of the intention of Parliament.

As learned counsel for the defendant relies heavily on the words of s. 420(1), (2), (3) and (4) NLC, it is appropriate to reproduce them as follows:

> (1) Notwithstanding anything in any other written law, no order of the Court vesting any alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.
>
> (2) The Court shall, accordingly, cause a copy of any order to be served on the Registrar or, as the case may be, (Land Administrator) forthwith after the making thereof; and the Registrar or (Land Administrator), upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.
>
> (3) The Registrar or (Land Administrator) shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.
>
> (4) Where the Registrar or (Land Administrator) takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

Special emphasis was placed by defendant's learned counsel on the opening words "Notwithstanding anything in any other written law" in s. 420(1).

In my view, s. 420(1), (2), (3) and (4) provide for the registration of vesting orders and the procedural steps which the registrar or the Land Administrator must take in order to effect such registration.

However, the fact is that when NLC was enacted in 1965, BAFIA had not been brought into being yet. I am therefore of the view that Parliament could not have intented s. 420 of the NLC to override the provisions of s. 50(1) and (3) of BAFIA which as stated above was never in existence then. The written law referred to in s. 420(1) must be the written law in force at the time when s. 420(1) was enacted and could not include eg, s. 50(1) and (3) BAFIA.

On the other hand, s. 50(3) of BAFIA provides that the vesting order "shall have effect according to its terms notwithstanding anything in any law or in any rule of law, ...".

Since s. 420 NLC was already in existence at the time when s. 50(3) BAFIA was enacted, it was obvious that the intention of Parliament is that the words "shall have effect according to its terms notwithstanding anything in any law or in any rule of law" must mean that the vesting order shall take effect despite the provisions contained in s. 420(1), as s. 420(1) is clearly and unambiguously overridden by s. 50(3). In other words s. 50(3) BAFIA prevails over s. 420(1) NLC. In any event, where there is an inconsistency between the provisions of two Acts of Parliament, as in s. 420 NLC and s. 50(1) and (3) of BAFIA, the latter which was enacted some 24 years later, must prevail. In *Ramayah @ Ramasamy a/l Etican v. Hussin bin Dahlan* [1993] MLJ 113, Richard Talalla, J (as he then was) observed that since s. 123 of the Legal Profession Act 1976 was enacted long after s. 69(g) of the Subordinate Courts Act 1948, the provisions of s. 123 of the Legal Profession Act 1976 must prevail if there was a conflict between them. In the circumstances, there can be no doubt in my mind that the terms of the vesting order by virtue of s. 50(3) BAFIA would prevail over or supersede all laws including s. 420(1) of the NLC.

I am mindful of a point of practice and procedure pertaining to a cause or matter eg, pending charge actions. As a general rule, where the rights under a charge have been vested into another party, (the successor party), that successor party must be substituted as plaintiff under O. 15 r. 7(2) of the Rules of the High Court 1980; and the relevant charge must be transferred and registered in the name of that other party pursuant to the NLC.

The said O. 15 r. 7(2) is reproduced as follows:

> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

However, in the instant case, the vesting order is all-encompassing and s. 50(3) BAFIA allows these proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd. as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd.

This is because s. 50(3) BAFIA provides that the terms of the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, thereby prevailing over or superseding the

provisions of both the Rules of the High Court 1980 and the NLC. Support for my view herein may be found in *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131, where the question before the Court of Appeal was whether, in a change in the identity of the chargee, there is a need for the title of the action to be substituted to reflect the identity of the true chargee before the auction can be enforced. Briefly, in that case, the essential fact was that there was a similar vesting order under s. 50(1) and (3) BAFIA in which the predecessor bank had transferred and vested all its banking business in a successor bank. Pursuant to an order for sale, an auction was carried out in the name of the predecessor bank. As in this case, the Court of Appeal was asked to decide on the legal implications of s. 50(3) BAFIA and O. 15 r. 7(2) of the Rules of the High Court 1980. The Court of Appeal after referring to s. 50(3) and O. 15 r. 7(2), *supra,* held as follows:

> Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O. 15 r. 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s. 50(3) of the Act, we consider that there is no necessity for a formal order under O. 15 r. 7(2) to regularise the position of the successor bank.

In order to give a comprehensive coverage to the issues raised for the defendant, I shall now proceed to consider the effect of the relevant terms of the vesting order. A reference to a paragraph hereinafter is a reference to that paragraph in the vesting order.

Pursuant to para. (A), the transfer of all "assets" was "given effect to and granted" by the court on 1 March 2001. In the vesting order, the word "assets" means all assets in relation to or utilised in the banking business of the plaintiff which would naturally include the registered charge. As such, the registered charge was already transferred as at 1 March 2001.

Paragraph (B) states that "in addition and not in derogation to para. (A) above ... the following additional and/or supplemental orders and directions are made ..."

It is to be noted that para. B(xvi) as amended on 2 March 2001 which is relied upon by the defendant is subject to this qualification which, where relevant, reads as follows:

(xvi) for the purpose of vesting in the TRANSFEREE pursuant to this order of any Land ... the lodging ... of this Order ... shall be accepted by the said registering authority ... and the said registering authority ... shall register this Order ... and such registration shall be effective to vest the land ... in the Transferee ... and every such registration authority is directed to carry out and give effect to the provisions of Section 420(2), (3), and (4) of the National Land Code 1965.

It is clear to me that para. (A) is the main order whereas para. (B)(xvi) is a supplemental direction which cannot supersede the provisions of para. (A). Further para. (B)(xvi) does not make it mandatory or imperative for the lodgment of the vesting order with the registering authority, but if the plaintiff is minded to do so, it is mandatory for the registering authority to register the vesting order. However, para. B(xvi), at the risk of repetition cannot be so construed as to override the principal order contained in para. (A).

Indeed, the whole of para. (B) in general and sub-para. (xvi) in particular are for the purpose of facilitating the transfer of the registered charge but, as stated above, it is not a mandatory requirement. By virtue of para. (A), the transfer has already taken place.

In this connection, I am of the view that para. B(xvi) and also (xvii) merely direct the proper land registering authority to accept and register the vesting order, but they do not provide that the transfer of the registered charge is subject to such registration.

My view is fortified by the other clear provisions contained in para. (B) which allow the originating summons herein to proceed without transferring the registered charge to Malayan Banking Bhd. By way of illustration, para. (B)(i), (ii) and (iii) vest the registered charge; substitute the name of Malayan Banking Bhd. in place of the plaintiff in respect of any instrument including the registered charge; and substitute the name of Malayan Banking Bhd. in place of the plaintiff in respect of any agreement including the charge annexure, from the transfer date of 1 March 2001.

Paragraph (B)(viii) in effect provides that the registered charge shall be held by Malayan Banking Bhd. as security, while para. (B)(ix) and (xii) in effect provide that the rights under the originating summons have been effectively transferred to Malayan Banking Bhd. as if it had at all times been a right of Malayan Banking Bhd. and enabling Malayan Banking Bhd. to continue with the originating summons as if Malayan Banking Bhd. had been a party thereto instead of the plaintiff.

Furthermore, as alluded to above, in accordance with s. 50(3) BAFIA, para. (C) specifically states that the said vesting order "shall have effect according to its terms notwithstanding anything in law or in any rule of law and shall be binding on any person thereby affected regardless that the person so affected is not a party to those proceedings."

The vesting order in clear and unambiguous terms states that the transfer is given effect to and granted by the court from 1 March 2001. That being the case, the property and business of the plaintiff have been vested in Malayan Banking Bhd. with effect from 1 March 2001.

I therefore hold that the preliminary objection is devoid of merits and is hereby dismissed with costs and that the originating summons shall be heard on its merits.